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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

14 SABRINA LAGUNA, an individual; CARLOS) Case No.: 09-cv-02131-JM-BGS
15 ACEVEDO, an individual; TERESA SALAS, an) *(Assigned to Hon. Jeffrey T. Miller and*
16 individual; and ROES 3-50 on behalf of themselves) *Hon. Bernard G. Skomal)*
17 and in a representative capacity for all others)
18 similarly situated)

17 Plaintiffs,)

18 v.)

19 COVERALL NORTH AMERICA, INC., a) **PLAINTIFFS' OPPOSITION TO**
20 Delaware Corporation; ALLIED CAPITAL) **ALLIED CAPITAL CORP.'S AND**
21 CORPORATION, a Maryland Corporation; ARES) **ARES CAPITAL CORP.'S MOTION**
22 CAPITAL CORPORATION, a Maryland) **TO COMPEL ARBITRATION AND**
23 Corporation; CNA HOLDING CORPORATION, a) **STAY THIS ACTION UNDER THE**
24 Delaware Corporation; TED ELLIOTT, an) **FEDERAL ARBITRATION ACT, &**
25 individual; and DOES 5 through 50 inclusive) **JOINER IN COVERALL NORTH**
26) **AMERICA, INC.'S MOTION TO**
27) **COMPEL ARBITRATION**

24 Defendants.)

Date: August 8, 2011

Time: 10:00 a.m.

Courtroom: 16

Complaint Filed: August 8, 2008

Trial Date: February 27, 2012

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1 **I. INTRODUCTION**

2 Almost two years after Allied Capital Corporation (“Allied”) was added as a defendant in
3 this matter and forty-eight days after the United States Supreme Court’s ruling in *AT&T Mobility*
4 *LLC v. Concepcion*, 131 S.Ct. 1740 (2011), Allied and Ares Capital Corporation (“Ares”)
5 (collectively, “Defendants”) have moved to compel arbitration of Laguna’s and Salas’ claims.
6 Between the time that *Concepcion* was issued and the date Defendants filed this motion, Plaintiffs
7 were required to prepare an extensive and time consuming motion to re-open fact discovery and
8 establish due diligence by Plaintiffs’ counsel during the pendency of this action, consisting of 160
9 total pages (Doc. No. 199), to which Defendants filed their opposition of 100 pages on June 1,
10 2011 (Doc. No. 200), after which Plaintiffs filed their reply of 84 pages (Doc. No. 204).¹ In
11 addition, Defendants participated in ongoing litigation regarding discovery, which included
12 numerous meet and confer hearings with Magistrate Judge Skomal’s clerk, as well as nearly daily
13 communications regarding discovery and other matters between the issuance of *Concepcion* and
14 Defendants’ filing of the Motion to Compel Arbitration on June 14, 2011. If Defendants had not
15 waived their right to compel arbitration between the filing of Plaintiffs’ complaint adding them to
16 the case and the date of the *Concepcion* decision, they certainly waived their right to compel
17 arbitration by allowing this litigation to continue at the level that it did **following the Concepcion**
18 **decision**. Defendants offer no reason explaining why they did not earlier move for an order
19 compelling arbitration, except to state that *Concepcion* “clarified that the arbitration provisions in
20 the JFAs are enforceable” (Motion, p. 1:14-16). However, the body of law that existed in
21 California prior to *Concepcion* regarding class action waivers explicitly recognized that not all
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27 ¹ Defendants submit no evidence whatsoever to explain why they waited two years to file this Motion, or why
28 this Motion is timely after allowing hundreds of pages of briefing to occur **post-*Concepcion***, causing Plaintiffs to incur
an additional estimated \$341,866.00 in attorneys’ fees and costs.

1 class action waivers were *per se* unconscionable. In *Discover Bank v. Sup. Ct.*, 36 Cal.4th 148
2 (2005), the California Supreme Court held a waiver of class wide arbitration in a consumer
3 contract of adhesion *may* be unconscionable under certain circumstances. However, the Court also
4 concluded, “**we do not hold that all class action waivers are necessarily unconscionable.**” *Id.*
5 at 162 (emphasis added.)
6

7 More importantly, Defendants have not submitted any evidence establishing the threshold
8 issue of whether or not the parties agreed to arbitrate this case. *See Avedon Eng’g, Inc. v. Seatex*,
9 126 F.3d 1279, 1287 (10th Cir. 1997). Here, Defendants refuse to produce copies of the arbitration
10 agreements for the putative class, while at the same time seeking to stay the action for the entire
11 putative class. “The existence of an agreement to arbitrate is a threshold matter which must be
12 established before the FAA can be invoked.” *Id.* at 1287. Defendants refuse to produce any
13 evidence that arbitration agreements exist for anyone besides Ms. Laguna and Ms. Salas (the Court
14 should note Defendants do not even submit declarations or affidavits to the effect that there are
15 arbitration agreements with anyone beyond Ms. Laguna and Ms. Salas) and have not submitted any
16 evidence to meet their burden of proving that arbitration agreements exist for any other putative
17 class member. Plaintiffs are entitled to limited arbitration-related discovery pursuant to a long line
18 of cases (*see* Plaintiffs’ Motion For Limited Arbitration Discovery, Doc. No. 212), as it is
19 undisputed that the existence of the arbitration agreement is a statutory prerequisite to granting the
20 Motion. Thus, Defendants’ Motion must be denied in its entirety on that basis alone. Furthermore,
21 and as more fully discussed below, the arbitration agreements Defendants rely upon, as to Laguna
22 and Salas, are invalid, unenforceable, and unconscionable.
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1 **II. FACTUAL AND PROCEDURAL BACKGROUND**²

2 Plaintiffs filed their original wage and hour class action complaint against Coverall North
 3 America, Inc. (“Coverall”) in San Diego Superior Court on August 8, 2008. See Lorens Decl. On
 4 August 20, 2009, Plaintiffs filed their Second Amended Complaint (“SAC”) in San Diego Superior
 5 Court, adding Allied Capital Corporation (“Allied”) as a defendant. *See id.* Allied removed this
 6 action to this Court on September 29, 2009. (Doc. No. 1.) Shortly after its removal, Allied filed
 7 a motion to dismiss Plaintiff’s SAC in its entirety (Doc. No. 4), but did not raise arbitration as an
 8 issue, which this Court denied on December 18, 2009. (Doc. No. 10.) Allied answered Plaintiffs’
 9 SAC in January 2010, but did not raise the existence of the arbitration agreement as an affirmative
 10 defense. (Doc. No. 11.) In fact, Allied pled affirmative defenses which would only apply to class
 11 action litigation. Clearly, Allied/Ares, as well as the Coverall defendants, withheld all evidence
 12 from Plaintiffs that they might ever seek regarding arbitration in this case.
 13

14 On April 16, 2010, Plaintiffs, Coverall, and Allied appeared for an ENE conference³. (Doc.
 15 No. 22.) On May 24, 2010, Plaintiffs, Coverall, and Allied exchanged Rule 26 disclosures. See
 16 Lorens Decl. In the meantime, Plaintiffs served discovery on Coverall and Allied, the majority of
 17 which Coverall and Allied objected to, and met and conferred with Coverall and Allied for several
 18 months. *See id.*⁴
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 23 ² Defendants’ summarization of the status of this litigation omits all of the litigation in which Defendants
 24 engaged.

25 ³ While it later came to Plaintiffs’ attention that Allied had merged with Ares prior to the ENE, that
 26 information was withheld from Plaintiffs’ counsel and the Court. However, Plaintiffs’ counsel sought to add Ares as
 a defendant once they were made aware that Ares had subsumed Allied.

27 ⁴ For a more detailed factual outline of the litigation history in this action, to date, please see Declaration of
 28 L. Tracee Lorens, filed in support of Motion for Limited Fact Discovery and to Re-Open and Complete the Deposition
 of Ted Elliott (Doc. 199).

1 On August 4, 2010, Plaintiffs filed a Motion for Leave to File Third Amended Complaint.
2 (Doc. No. 34.) Plaintiffs sought to add Ares, CNA Holding Corporation (“CNA Holding”), and
3 Ted Elliott (“Mr. Elliott”) as defendants, Acevedo and Salas as class representatives, two new
4 causes of action, and a joint employer/joint enterprise theory of liability. The Court granted this
5 Motion to Amend in its entirety on October 15, 2010. (Doc. No. 60.) Neither Coverall nor Allied
6 ever raised arbitration in their opposition to Plaintiffs’ Motion to Amend. In fact, while
7 Defendants Allied and Ares have four attorneys representing them in this matter, and have been
8 present at all depositions since they were named in the action in August 2009, they have never
9 once uttered the word “arbitration.” They did not ask any of the class representatives during their
10 deposition about arbitration clauses (of course, Mr. Acevedo does not have an arbitration clause)
11 nor did they question any of the class representatives or absent class members deposed regarding
12 whether they had an arbitration agreement in their JFA, whether they had read that agreement,
13 whether they had ever discussed that agreement with anyone, whether they had consented to that
14 agreement, whether they were aware that agreement existed in at least two contracts, whether they
15 understood the agreement, or whether the agreement was even in a language that they could
16 understand.
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20 On August 31, 2010, Plaintiffs, Coverall, and Allied filed a Joint Motion for Determination
21 of Discovery Dispute regarding the Class Certification Briefing Schedule and for Approval of a
22 Stipulation for Revised Scheduling Order (Doc. No. 39), which the Court granted on September
23 10, 2010. (Doc. No. 48.) On September 1, 2010, Coverall and Allied took the deposition of
24 Claire Mount, a putative class member, and on September 16, 2010, Coverall and Allied took the
25 deposition of Edgar Bilbao, another putative class member. Lorens Decl. On October 25, 2010,
26 Plaintiffs filed their TAC. (Doc. No. 147.) Plaintiffs filed their Motion for Class Certification on
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1 November 15, 2010. (Doc. No. 75.) Allied and Ares filed a motion to dismiss the TAC on the
2 same day, as did Coverall and CNA Holding (Doc. Nos. 76-77). None of the defendants raised
3 arbitration in these motions to dismiss. On February 14, 2011, the Court granted the motions to
4 dismiss in part and denied them in part. (Doc. No. 132.)

5
6 On December 1, 3, and 6, 2010, Defendants and Coverall took the depositions of Teresa
7 Salas, Carlos Acevedo, and Sabrina Laguna, again, respectively. Lorens Decl. Defendants and
8 Coverall also propounded 443 discovery requests on the class representatives, which consisted of
9 interrogatories and document requests. *See id.* At no time during the depositions of any of the
10 class representatives (and Ms. Laguna was deposed on three separate days over a 2 year time
11 period, as recently as December 11, 2010) did the Defendants ever even utter the word
12 “arbitration.” They did not inquire of the Plaintiffs, or the absent class members who they
13 deposed, as to whether or not an arbitration agreement existed in their contracts, or whether they
14 had consented to any such arbitration agreement. There is just absolutely no evidence whatsoever
15 that arbitration agreements exist for anyone other than Ms. Laguna and Ms. Salas. As to their
16 agreements, the contract itself states that arbitration must be sought “promptly” or at least, “within
17 two years.” (See JFAs lodged with Defendants’ moving papers at ¶¶ 21(A) and 22, respectively).
18
19 Thus, pursuant to *Platt Pacific, Inc. v. Andelson*, 6 Cal.4th 307 (1993), Defendants’ arbitration
20 demands as to the only two arbitration agreements that the evidence shows exist must be denied
21 as untimely, as well as because the agreements are unenforceable based on procedural
22 unconscionability, substantive unconscionability, and waiver.

23
24 Plaintiffs filed their Fourth Amended Complaint (“FAC”) on March 7, 2011 (Doc. No.
25 147), which Defendants moved to dismiss on March 24, 2010. (Doc. No. 163.) They again failed
26 to raise arbitration as an issue. On March 18, 2011, Defendants filed their opposition to Plaintiffs’
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1 class certification motion (Doc. No. 159), and on April 1, 2011, Plaintiffs filed their reply. (Doc.
 2 No. 168.) On May 19, 2011, Plaintiffs filed a Motion for Limited Fact Discovery and to Re-Open
 3 and Complete the Deposition of Ted Elliott (Doc. No. 199), which Defendants opposed on June 1,
 4 2011. (Doc. No. 201.)⁵

5
 6 **III. THE COURT SHOULD DENY DEFENDANTS' MOTION TO COMPEL**
 7 **ARBITRATION**

8 The FAA governs arbitration agreements in contracts involving transactions in interstate
 9 commerce. 9 U.S.C. § 1; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25
 10 n.32 (1983). Pursuant to *Section 2* of the FAA, arbitration agreements "shall be valid, irrevocable,
 11 and enforceable, save upon such grounds that exist at law or in equity for the revocation of any
 12 contract." 9 U.S.C. § 2. In the absence of a contract consenting to arbitrate, there is no basis to
 13 compel arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 130 S.Ct. 1758, 1773-74
 14 (2010). The enforceability of an arbitration agreement is dependent on the consent of the parties
 15 thereto. *Sonic-Calabasas, Inc. v. Moreno*, 51 Cal.4th 659, 694-695 (2011); *Cable Connection, Inc.*
 16 *v. DIRECT-TV, Inc.*, 44 Cal.4th 1334, 1358 (2008). Thus, when presented with a motion to
 17 compel arbitration, a court's first task is to determine whether, in fact, the parties have agreements
 18 to arbitrate the dispute. *See, e.g. Romo v. Y-3 Holdings*, 87 Cal.App.4th 1153, 1158 (2001). Here,
 19 while the existence of the agreement is a statutory prerequisite to granting a motion to compel
 20 arbitration, and a defendant bears the burden of proving the existence of the agreements,
 21 Defendants have produced only two arbitration agreements, i.e., for Laguna and Salas.

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 26 ⁵ The *Concepcion* decision was issued on April 27, 2011, yet Defendants refused to stay this litigation
 27 (although Plaintiffs made numerous requests for a stay due to ongoing settlement negotiations) and forced the litigation
 28 to continue for another six weeks, thus forcing Plaintiffs to incur another merely \$350,000 in fees and costs, before
 they brought this motion.

1 **A. Plaintiffs Should Have Been Afforded an Opportunity to Conduct Limited**
2 **Arbitration-Related Discovery Prior to Filing This Opposition.**

3 “The FAA provides for discovery and a full trial in connection with a motion to compel
4 arbitration only if ‘the making of the arbitration agreement or the failure, neglect, or refusal to
5 perform the same be an issue.’ 9 U.S.C. § 4.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th
6 Cir. 1999). “A proceeding to compel arbitration is in essence a suit in equity to compel specific
7 performance of a contract.” *Condee v. Longwood Mgmt. Corp.*, 88 Cal.App. 4th 215, 218 (2001);
8 *Freeman v. State Farm Mut. Auto Ins. Co.*, 14 Cal.3d 473, 479 (1975); *Spear v. California State*
9 *Auto. Assn.*, 2 Cal.4th 1035, 1040 (1992). Here, Plaintiffs sought copies of arbitration agreements
10 for the putative class because Defendants seek to stay the action for the entire putative class.⁶

11 Plaintiffs sought via meet and confers with defense counsel, and thereafter a hearing with
12 Magistrate Judge Skomal which was followed by a motion which was filed on June 24, 2011, to
13 obtain copies of any and all arbitration agreements in existence with the putative class. Plaintiffs
14 also sought several depositions to establish the validity and enforceability of those agreements,
15 and the relationship between the signatories to the agreements and the non-signatories to those
16 agreements. (Doc. No. 215). As of 12:00 p.m. on July 25, 2011 (the day that this opposition is
17 due for filing), there has not been a ruling on that motion. Plaintiffs did file an *ex-parte* request
18 to continue the briefing schedule on this motion, so that they could obtain the above-described
19 discovery, but were advised that a decision on their *ex-parte* request would not be issued until after
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25 ⁶ They make this request even though they know that Carlos Acevedo is an adequate class representative,
26 does not have an arbitration agreement, and could prosecute the class case on behalf of any persons without valid
27 arbitration agreements, without regard to how this motion is decided. Further, the motion for class certification could
28 easily be heard concurrently with this motion in that, the Court could easily create a sub-class for any individuals whom
the Defendants finally produce valid arbitration agreements for, if any, thereby allowing Mr. Acevedo to continue to
prosecute the class action for any putative class members who do not have valid and enforceable arbitration agreements
in existence.

1 Magistrate Judge Skomal issued an order on Plaintiffs' motion for arbitration-related discovery.

2 Thus, it is Plaintiffs' position that they have done everything possible to ascertain the
3 existence of arbitration agreements, a prerequisite necessary for Defendants' motion to be granted,
4 and that there is not any evidence of arbitration agreements with anyone other than Ms. Laguna
5 and Ms. Salas. In addition, Defendants did not file any affidavits or declarations with their moving
6 papers providing evidence that arbitration agreements exist for any other members of the putative
7 class. Plaintiffs fear that Defendants may attempt to create a record of other agreements or file
8 declarations or affidavits in that regard along with their reply papers. This would be the ultimate
9 in lack of due process and any such evidence, filed with a reply brief, should be stricken. Clearly,
10 Plaintiffs have tried at every juncture to ascertain whether other agreements exist and have been
11 thwarted not only by Defendants herein, but have been unable to obtain rulings from the
12 Magistrate Judge allowing them to even **serve** discovery in that regard.

15 Plaintiffs should also have been afforded an opportunity to conduct limited arbitration
16 related discovery prior to filing their opposition herein because if Defendants do establish that
17 arbitration agreements exist (such as the two agreements in evidence regarding Ms. Laguna and
18 Ms. Salas), Plaintiffs have the burden of proving that the arbitration agreements are invalid, and
19 "must be given an opportunity to pursue discovery related to the issue that [they have] the burden
20 to prove.) *Livingston v. Assocs. Fin. Inc.*, 2001 U.S. Dist. LEXIS 8678, *10 (N.D. Ill. June 25,
21 2001) *rev'd on other grounds by Livingston v. Assoc. Fin. Inc.*, 339 F. 3d 553 (7th Cir. 2003).

23 Under established precedent, the determination of whether the parties have entered into a
24 valid, enforceable arbitration agreement is controlled by state law. *E.g. First Options of Chicago,*
25 *Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Romo v. Y-3 Holdings*, 87 Cal.App.4th 1153, 1158
26 (2001). Here, Defendants are prematurely asking the Court to rule on the validity of the arbitration
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1 agreement, without the benefit of a fully developed factual record as required by applicable state
2 and federal law. Given the fact-intensive nature of this inquiry, the validity of the agreement
3 should not be resolved on the pleadings alone. *See Granite Rock Co. v. International Brotherhood*
4 *of Teamsters*, 130 S. Ct. 2847, 2856 (2010).

5
6 Because Plaintiffs were ordered by Magistrate Judge Skomal to withdraw the arbitration-
7 related discovery they served, and await a ruling on a motion in that regard, there is no evidentiary
8 record with respect to arbitration as Plaintiffs have not had the opportunity to even serve
9 discovery, let alone to conduct discovery on a limited basis regarding Defendants' motion to
10 compel arbitration. Since Defendants raised this issue for the very first time on June 10, 2011,
11 even though the case had been pending for three years, it seems highly prejudicial that the
12 Plaintiffs have been precluded from even serving arbitration-related discovery. There is no
13 substantive record upon which the Court can base its decision (other than that there are two
14 arbitration agreements relating to Ms. Laguna and Ms. Salas and that they are unenforceable
15 because the Defendants failed to perform pursuant to those arbitration agreements and move to
16 compel arbitration "promptly" (as required in ¶21(A) or "within two years" (as required in ¶22))
17 and, thus, no reasonable inferences can be drawn therefrom. Furthermore, issues like waiver and
18 whether arbitration agreements exist for the putative class go to the very heart of whether or not
19 the parties consented to arbitration. Arbitration discovery is routinely granted. *E.g., Green Tree*
20 *Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000); *Blair v. Scott Specialty Gases*, 283 F.3d 595,
21 608-610 (3d Cir. 2002).

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B. Issues Concerning The Existence Of And Enforceability Of Arbitration Agreements Are For The Court's Determination.

Federal courts rely on state law when addressing issues of contract validity and enforceability. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936-37 (9th Cir. 2001). Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening *Section 2* of the FAA. *Id.* at 937 citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996). Issues concerning the existence of an enforceable arbitration agreement are for the court's decision. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-446 (2006); *see also Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007) ("When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts [as opposed to the arbitrator] must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2." (brackets in original; internal quotes omitted)).⁷

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⁷ In the event that Defendants claim that the arbitration agreement altered the Court's authority to determine issues of arbitrability, the arbitration agreements here do not meet the heightened standard that must be satisfied to vary the rule that the court decides the gateway issue of arbitrability. See Exhibits A & B to Coverall's Request for Judicial Notice, Janitorial Franchise Agreements ("JFA"), ¶ 21(A). (Doc. No. 205-2.) The JFA's upon which Defendants rely contain a severability clause that uses the phrase "court of competent jurisdiction," rather than the term "arbitrator," which indicates that the Court has the authority to decide whether the arbitration agreement is unenforceable. (JFA, ¶ 28.) Because there is ambiguity within the arbitration agreement, the court should decide the arbitrability issue. *See Parada v. Sup. Ct.*, 176 Cal.App.4th 1554, 1566 (2009) quoting *Baker v. Osborne Development Corp.*, 159 Cal.App.4th 884, 893-894 (2008) ("Although one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, another provision indicated that the court might find a provision unenforceable."); *see also Dream Theater, Inc. v. Dream Theater*, 124 Cal.App.4th 547, 552 (2004) citing *First Options*, 514 U.S. at 945; *Hunt v. Sup. Ct.*, 81 Cal.App.4th 901, 909 (2000); *Greenspan v. LADT, LLC*, 185 Cal.App.4th 1413, 1440 (2010) citing *First Options*, 514 U.S. at 943-945 (finding that parties may reserve to the arbitrator the exclusive authority to determine gateway issues of arbitrability, but only if there is clear and unmistakable evidence of such an agreement, and when a contract is ambiguous regarding the arbitrator's power to determine such issues, it cannot satisfy the clear and unmistakable standard).

1 C. **The Arbitration Agreement Specifically Limits Arbitration Participants to**
 2 **Franchisees, Coverall, and its Officers, Directors, Agents, and Employees.**

3 Parties may contractually agree to limit with whom they chose to arbitrate their disputes.
 4 *Concepcion*, 131 S.Ct. at 1743. When enforcing or interpreting an arbitration clause courts are
 5 required to “give effect to ...contractual limitations, and...must not lose sight of the purpose of the
 6 exercise: to give effect to the intent of the parties.” *Stolt-Nielsen*, 130 S.Ct. at 1774-1775. The
 7 parties’ intentions control because the arbitrator derives her/his power from the consensual
 8 agreement of the parties. *Id.* “An arbitrator has no general charter to administer justice for a
 9 community which transcends the parties but rather is part of a system of self-government created
 10 by and confined to the parties.” *Id.* (internal quotation marks omitted).

11 Here, in two places in the JFA, Coverall and the Franchisees contractually limited the
 12 persons/entities that can participate in any arbitration. In Paragraph 21 (A) of the JFA only
 13 “claims between Coverall, its officers, directors, agents and/or employees...and Franchisee...” are
 14 required to be “submitted promptly for arbitration.” Then, in paragraph 21 (A)(11), the parties
 15 *specifically excluded* any other persons/entities as follows :

16 **Only Coverall (and its officers, directors, agents and/or employees) and**
 17 **Franchisee (and Franchisee’s owners, officers, directors and/or guarantors) may**
 18 **be parties to the any arbitration proceeding** described in Paragraph 21 (A).

19 There is no dispute that Ares is not an officer, director or employee of Coverall. Nor has
 20 Ares submitted any evidence reflecting that it is an agent of Coverall despite that such an
 21 admission is the most direct route to being included in the arbitration proceedings. Indeed, had
 22 Ares come forward with evidence that it was an agent of Coverall, it would not have had to make
 23 the “non-signatory” arguments it now makes since agents are specifically included in the

1 arbitration provision. Ares has purposefully not submitted any evidence in support of its Motion.⁸

2 The party seeking arbitration bears the burden of proving that there is an agreement to
3 arbitrate between the parties by a preponderance of the evidence. *Rosenthal v. Great Western Fin.*
4 *Securities Corp.* 14 Cal.4th 394, 413 (1996). By submitting no evidence, Ares failed to meet its
5 burden of proving it is an agent of Coverall entitled to join in the arbitration proceedings.
6

7 **1. Ares is Not an Agent of Coverall.**

8 General contract and agency principles apply in determining whether an arbitration
9 clause can be enforced by or against a non-signatory, including incorporation by reference,
10 assumption, agency, veil-piercing/alter ego, and estoppel. *Comer v. Micor, Inc.*, 436 F.3d 1098,
11 1101 (9th Cir.2006); *Valueselling Associates, LLC v. Temple* 2009 WL 3736264 * 6 (S.D.Cal.
12 2009). Based on these principles Ares contends that it may compel arbitration merely by
13 referencing agency and alter ego allegations in Plaintiffs' FAC without further proof. But Ares
14 has not cited to any cases that contain *a specific exclusionary provision like the one contained in*
15 *the Coverall agreement.* Moreover, also under general contract principles, the intent of the
16 contracting parties *controls* and here they agreed that agents could join in, but no one else. As a
17 reflection of that concept, boilerplate agency allegations in a signatory's complaint are not
18 sufficient to allow a non-signatory to force arbitration.⁹ Other courts have required or relied upon
19 evidence submitted by the non-signatory to prove it falls within a category allowed to enforce the
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23 ⁸ It is also interesting that Ares does not contend it is entitled to enforce the arbitration clause as a successor
24 in interest to Coverall (JFA ¶ 30) or as an assignee (JFA ¶ 16). This is because then Ares would have to provide
25 detailed documentation about its transactions with Coverall demonstrating those legal relationships (the assignment
and/or the successor corporate liability). See, e.g. *Britton v. Co-Op Banking Corp.*, 4 F.3d 742, 746 (9th Cir. 1993).

26 ⁹ The allegations in that case were very similar to the FAC ¶¶ 12 & 14 where Plaintiff alleged that "each
27 Defendant acted ...as the agent of the other Defendant.." and "each and every Defendant and entity named herein was
28 the agent... of each and every other Defendant...". *Brown v. General Steel Domestic Sales, LLC* 2008 WL 2128057
*7 (C.D.Cal. 2008).

1 agreement. *See, e.g. Wolf v. Langemeier*, 2010 WL3341823 * 4 (E.D. Cal 2010) (non-signatory
2 submits declaration showing it was agent and successor in interest); *Britton*, 4 F.3d at 747 (non-
3 signatory submits facts of agency and employment and to support its motion to compel
4 arbitration).

5
6 Given the contractual language in this case, for Ares to be able to force arbitration it should
7 have to provide evidence of agency or alter ego or, alternatively, provide Plaintiffs the opportunity
8 to conduct discovery on this issue. When parties dispute the arbitrability of a claim or whether
9 a non-signatory is a party to the arbitration agreement and can enforce the same, limited discovery
10 on those issues is permitted. *Dun Shipping Ltd. v. Amerada Hess Shipping Corp.* 234 F.Supp.2d
11 291, 293 (S.D.N.Y.,2002). In the *Dun* case the court allowed discovery between the parties about
12 the relationships between the various Defendants, alter ego, agency, notice, knowledge and
13 acquiescence. *Id.* at 295-297. As to the parties who claimed the non-signatory was not entitled
14 to enforce the arbitration provision, the *Dun* court stated:

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17 Given the contested factual record, it is difficult to conclude, as a matter of law,
18 that Plaintiff was or was not a party to the Charter Party and, as a result, can or
19 cannot enforce the Charter Party arbitration provisions. The Court will allow
20 limited further discovery on this issue by Defendants and requests that the
21 Magistrate revisit this issue by evidentiary hearing (or upon submission) thereafter.
22 *See, e.g., Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d
23 Cir.1980) (a “complicated set of conflicting facts requires an evidentiary hearing
24 it is the very purpose of the trial to establish which party's version of the
25 contested circumstances best comports with reality.”). *Id.* at 295.

26
27 The *Dun* court referred the parties back to the magistrate judge for “the purpose of
28 scheduling limited discovery as outlined [in its order] and ...revisiting the issue of arbitrability by
hearing or upon submission in light of such discovery. *Id.* at 297.

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2. Ares' Equitable Estoppel Argument Fails.

Ares claims that it is entitled to rely on equitable estoppel to force arbitration simply based on the allegations in the FAC and no further evidence; however, the equitable estoppel theory only applies in "certain limited circumstances". *Valueselling*, 2009 WL 3736264 * 6.¹⁰ Based on the specific contractual exclusion, this is not one of those limited circumstances.

In support of their equitable estoppel argument, Ares has failed to cite, and Plaintiffs have not located, any controlling case where the court applied the equitable estoppel theory and allowed a non-signatory to force arbitration despite a specific provision in the arbitration clause expressly excluding non-signatories. The arbitration clauses that were the subject of *Valueselling* contained very simplistic one paragraph provisions with no additional exclusionary contract provisions. See **Exhibit 1** to RJN. In contrast, the parties here twice contractually limited the persons/entities that could participate in any arbitration.¹¹

Equitable estoppel only applies if (1) Plaintiffs "must rely on the terms of the written agreement in asserting [their] claims against" Ares or (2) Plaintiffs raise "allegations of substantially interdependent and concerted misconduct" by both Ares "and one or more of the signatories to the contract." *Id.* Because this theory is equitable in nature, the court has "considerable discretion to select a remedy that is appropriate under the circumstances." *Amisil Holdings, Ltd. v. Clarium Capital Management, LLC* 2006 WL 3949332, 14 (N.D.Cal.2006). Plaintiffs submit that since Plaintiffs have made a prima facie case of exclusion, Ares should now have the burden of proving that it meets the test without simply relying on Plaintiffs' FAC

¹⁰Some courts have even characterized the application of equitable estoppel as "rare". See, e.g. *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002).

¹¹In their opposition to Plaintiffs' class certification motion, Coverall confirms that the JFAs are solely between Coverall and the Franchisees and that Ares is not a party. (Doc. No. 158, pg.4, n.4.)

1 allegations of alter ego, joint enterprise and joint employer. Equitable estoppel should not be
 2 based exclusively on the allegations contained in the complaint, it should be granted when “the
 3 totality of the evidence supports an objective intention to agree to arbitrate,” *See Ross v. American*
 4 *Express Company*, 547 F.3d 137, 148 (2nd Cir. 2008). The burden should be on the nonsignatory
 5 defendant to show that the signatory plaintiff intended to submit to arbitration notwithstanding the
 6 absence of a formal agreement. *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL
 7 1753784, *5 (N.D.Cal. 2011).

9 There is a “black letter rule that the obligation to arbitrate depends on consent.” *Id.* The
 10 intent of the parties when entering into the JFA cannot be ignored in these circumstances. The
 11 JFA provides for arbitration when the dispute arises “out of or [is] related to *the relationship of*
 12 *the parties*, this Agreement...any related agreement *between the parties*, and/or any specification,
 13 standard or operating procedure of Coverall.” Thus, when the Franchisees executed the JFA they
 14 agreed to arbitrate disputes arising out of *their relationship with Coverall and their contract with*
 15 *Coverall* - - - not Allied/Ares, entities that they had never met. To Plaintiffs’ knowledge, Ares had
 16 no direct contact with any Franchisees either during JFA negotiations or thereafter.¹² When
 17 Franchisees entered into the JFA not one of them knew that he/she was entering into any kind of
 18 relationship with Ares and, therefore, could not have had the necessary intent to agree to arbitrate
 19 this dispute with Ares. In such circumstances equitable estoppel does not apply. *See Ross* at 143.

22 Whether estoppel applies depends “on the degree to which the merits are bound up with
 23 the contract and whether there is ‘tight relatedness of the parties, contracts and controversies.’”
 24 *TFT-LCD, supra, citing JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 178 (2d Cir.2004).

26
 27 ¹²Again, it bears noting that if Ares was to prove that it was a successor in interest to Coverall or an agent or
 28 an assignee, all of its non-signatory problems would dissolve since the law is clear that once a non-signatory makes
 such a showing, it is allowed to enforce the arbitration provision.

1 As a matter of equity, the burden of proof in this regard has to be foisted onto Ares because
 2 Plaintiffs have no relationship and no contract with Ares. More importantly, they have been
 3 precluded from conducting full discovery into the relationships between defendants, including
 4 alter ego discovery. Ares' Motion should be denied, or, alternatively, Plaintiffs should be
 5 permitted to conduct discovery into the relationship between Ares and Coverall.
 6

7 **D. Defendants Have Waived their Right to Arbitrate.**

8 The right to compel arbitration arises from the parties' contract and, as with other
 9 contractual rights, is subject to waiver. *See Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d
 10 754, 758-759 (9th Cir. 1988). Such waiver may be express or implied from the parties' conduct.
 11 *See Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). A party seeking to prove
 12 waiver of a right to arbitration must demonstrate "(1) knowledge of an existing right to compel
 13 arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing
 14 arbitration resulting from such inconsistent acts." *United States v. Park Place Assocs., Ltd.*, 563
 15 F.3d 907, 921(9th Cir. 2009). It is for the court to decide whether a party has waived its right to
 16 arbitrate. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119-1121 (9th Cir. 2008). "A party
 17 acts inconsistently with its right to arbitrate if the party 'substantially invokes the litigation
 18 machinery before asserting its arbitration right.'" *Hooper v. Advance America, Cash Advance*
 19 *Centers of Missouri, Inc.*, 589 F.3d 917, 921 (8th Cir. 2009) (finding that defendant substantially
 20 invoked litigation machinery where it filed extensive and exhaustive motion to dismiss in which
 21 it asserted that the plaintiffs had failed to state claims for relief and sought a final decision from
 22 the district court upon the parties' entire dispute) *quoting Lewallen v. Green Tree Servicing,*
 23 *L.L.C.*, 487 F.3d 1085, 1090, 1092 (8th Cir. 2007) (finding that a request to dispose of a case on
 24 the merits before reaching arbitration "is inconsistent with resolving the case through
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arbitration.”). “Although prejudice manifests itself in myriad ways, ‘[p]rejudice results when . . . parties . . . litigate substantial issues on the merits, or when compelling arbitration would require a duplication of efforts.’” *Hooper*, 589 F.3d at 923 *quoting Kelly v. Golden*, 352 F.3d 344, 349-350 (8th Cir. 2003).

Defendants obviously knew of their right to compel arbitration, as they assert in their Motion that *Concepcion* “clarified that the arbitration provisions in the JFAs are enforceable.” Motion, p. 1:14-16. Yet, Defendants offer no evidence regarding their reasons for failing to file the Motion earlier in the litigation. Further, the law as it existed prior to *Concepcion* would not have conclusively rendered the arbitration agreements at issue unenforceable. In fact, in claiming that *Concepcion* recently clarified the enforceability of the arbitration agreements in the JFA’s, Defendants fundamentally mischaracterize California’s *Discover Bank* rule. In *Discover Bank*, 36 Cal.4th 148 (2005), the California Supreme Court held that a waiver of class wide arbitration in a consumer contract of adhesion *may* be unconscionable under certain circumstances. Specifically, the court concluded: “**We do not hold that all class action waivers are necessarily unconscionable.**” *Id.* at 162-163 (emphasis added). The principle that not all class action waivers are unconscionable and, thus, unenforceable was further fleshed out in *Smith v. Americredit Financial Services, Inc.*, 2009 U.S. Dist. LEXIS 115767 (S.D. Cal. Dec. 11, 2009), where defendant’s motion to compel arbitration was granted, despite the fact that the arbitration clause contained a class action waiver. To wit:

[U]nder *Discover Bank*, arbitration provisions that contain class action waivers are not *per se* unconscionable. Instead, a class action bar is unconscionable *only if* three factors are present: (1) the class action waiver is contained in a consumer contract of adhesion, (2) in which small amounts of damages are at issue, and (3) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. *Smith*, 2009 U.S. Dist.

1 LEXIS 115767 at *17-18 (emphasis added).

2 The *Smith* decision is crucially important because it came after the Ninth Circuit's holding
3 in *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) that the FAA did not preempt
4 California law, specifically the *Discover Bank* rule, regarding the unconscionability of class action
5 waivers in consumer contracts of adhesion. Notably, the Ninth Circuit's decision in *Laster* did not
6 come down until October 27, 2009, two months after Defendants were added to this case in August
7 2009.
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10 Moreover, once the Supreme Court granted certiorari of *Laster* in *Concepcion*, 130 S.Ct.
11 3322, on May 24, 2010, Defendants should have at a minimum moved to stay the proceedings
12 pending the Supreme Court's decision. See, e.g., *Carney v. Verizon Wireless Telecom, Inc.*, 2010
13 U.S. Dist. LEXIS 77636 (S.D. Cal. Aug. 2, 2010) (granting motion to stay proceedings pending
14 the outcome of *Concepcion*). This would have given Plaintiffs notice that Defendants intended
15 to arbitrate the case if the decision in *Concepcion* was in their favor. Instead, Defendants allowed
16 Plaintiffs to incur in excess of \$3 million in attorneys fees, preparing for class certification, which
17 is strong evidence of waiver, as Defendants "substantially invoked" the litigation machinery and
18 forced the Plaintiffs to spend millions of dollars preparing for class certification, a procedural
19 mechanism they now wish to abate altogether. The delay not only affected Plaintiffs, but misled
20 them and cause them sever prejudice.
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23 Further, Defendants have acted inconsistently with their right to arbitrate by engaging in
24 vigorous litigation, even after the *Concepcion* decision. Due to Defendants' inconsistent acts,
25 Plaintiffs will be substantially prejudice if Defendants' Motion is granted. Defendants have filed
26 numerous motions to dismiss seeking to resolve this case on the merits in its entirety, filed a
27 comprehensive Opposition to Plaintiffs' Motion for Class Certification, which required Plaintiffs'
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1 counsel to essentially shut down all other operations in order to research and brief the Reply, etc.

2 In light of Defendants' inconsistent acts with their right to arbitrate and the substantial prejudice

3 Plaintiffs will suffer, this Court should deny Defendants' Motion.

4
5 **E. Plaintiffs' Claims are Not Within the Scope of the Arbitration Agreement.**

6 Plaintiffs hereby incorporate their arguments from their Opposition to Coverall's Motion
7 to Compel Arbitration.

8
9 **F. The Arbitration Agreement is Unconscionable.**

10 Plaintiffs hereby incorporate their arguments from their Opposition to Coverall's Motion
11 to Compel Arbitration.

12
13 **G. The Arbitration Agreement Fails Due to Lack of Consent.**

14 Plaintiffs hereby incorporate their arguments from their Opposition to Coverall's Motion
15 to Compel Arbitration.

16 **IV. THE COURT SHOULD DENY DEFENDANTS' MOTION TO STAY THE**
17 **PROCEEDINGS**

18
19 Pursuant to *Section 3* of the FAA:

20 If any suit or proceeding be brought in any of the courts of the United States upon
21 any issue referable to arbitration under an agreement in writing for such arbitration,
22 the court in which such suit is pending, upon being satisfied that the issue involved
23 in such suit or proceeding is referable to arbitration under such an agreement, shall
24 on application of one of the parties stay the trial of the action until such arbitration
has been had in accordance with the terms of the agreement, providing the
applicant is not in default in proceeding with such arbitration. 9 U.S.C. § 3.

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1 “In deciding a motion to stay a proceeding pending arbitration, a court must determine ‘(1)
2 whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement
3 encompasses the dispute at issue.’” *McLeod v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 17188,
4 *2 (C.D. Cal. Apr. 14, 2005). “Where some portions of an action are arbitrable and others are not,
5 the decision to stay those claims not subject to arbitration is in the court’s discretion.” *Id.* at *2.
6 “In deciding whether to stay non-arbitrable claims, a court considers economy and efficiency, the
7 similarity of the issues of law and fact to those that will be considered during arbitration, and the
8 potential for inconsistent findings absent a stay.” *Id.* at *2.

10 Laguna’s and Salas’ arbitration agreements contain a provision that “[a] decision by the
11 arbitrator . . . shall be confidential . . . and may not be collaterally used . . . in existing or
12 subsequent litigation or arbitration involving any other franchisee or third party.” (JFA, ¶
13 21(A)(14).) This provision effectively eliminates any concerns regarding economy and efficiency
14 or inconsistent findings because this Court cannot use any previous determination on the same
15 issues of fact and/or law as collateral estoppel. Accordingly, there is no reason to stay this case
16 because Acevedo’s claims and those of the putative class members will be unaffected either way
17 by any decision that the arbitrator reaches with regard to Laguna’s and Salas’ claims.
18 Accordingly, this Court should deny Defendants’ Motion to Stay the Proceedings.

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1 **V. CONCLUSION**

2 Based on the foregoing reasons, Plaintiffs respectfully request that the Court deny
3 Defendants' Motion to Compel Arbitration and deny the Motion to Stay the Proceedings.
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6 **LORENS & ASSOCIATES, APLC**
7 **CADENA CHURCHILL, LLP**

8 Dated: July 25, 2011

By: /s/ L. Tracee Lorens

9 L. Tracee Lorens, Esq.

10 Attorney for Plaintiffs
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